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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGH FORD,

Defendant and Appellant.

D070689

(Super. Ct. No. SCD265485)

APPEAL from a judgment of the Superior Court of San Diego County, Sharon B. Majors-Lewis, Judge. Affirmed as modified.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial, defendant and appellant Hugh Ford was convicted of a count of transportation of a controlled substance (methamphetamine), and a related count of

possession for sale of the same substance. (Health & Saf. Code,<sup>1</sup> §§ 11379, subd. (a), 11378.) He admitted to a prior conviction of possession for sale of a controlled substance (§ 11378; the drug conviction).<sup>2</sup>

At sentencing, the court imposed a three-year prison term for the first count, denied a motion to strike the prior strike, and doubled the prison term. Pursuant to section 11370.2, the court next imposed a consecutive three-year sentence enhancement, to make up an aggregate nine-year term. As to the remaining count, four years plus an added three-year consecutive sentence enhancement for the drug conviction (again under § 11370.2, subd. (c)) were imposed, but stayed under section 654. On this point, the Attorney General's office has conceded the merit of Ford's argument that regarding the second count, the court incorrectly imposed and stayed the prior drug conviction enhancement.

In the contested portion of this appeal, Ford argues the trial court erred in imposing certain mandatory fines and fees. As relevant here, Ford was required to pay a statutory \$150 drug program fee pursuant to section 11372.7, plus increments of \$465 in

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<sup>1</sup> All further statutory references are to the Health and Safety Code unless noted. These charges were based on a vehicle stop in which substantial amounts of drugs and packaging materials were recovered from Ford's vehicle, consistent with his possession for sale. In view of the limited nature of the sentencing issues presented on appeal, it is not necessary to further outline the background facts.

<sup>2</sup> Ford had also admitted to a strike prior offense. (Pen. Code, §§ 459, 1170.12, subd. (a)-(d), 667, subd. (b)-(i), 668.)

penalty assessments, for an aggregate drug program amount, \$615.<sup>3</sup> He contends this section 11372.7 amount was excessive under the plain terms of the statute, which indicate a \$150 "fee" as the amount to be imposed. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519 (*Martinez*) [\$100 criminal laboratory analysis fee modified to comport with \$50 statutory amount].)

Under section 11372.5, the court also imposed a \$50 criminal laboratory analysis fee (the lab analysis fee), accompanied by \$155 in penalty assessments, comprising an amount of \$205.<sup>4</sup> (*Martinez, supra*, 65 Cal.App.4th 1511, 1520-1522 [lab analysis fee is a fine that increases the total fine, and that is subject to penalty assessments].) Ford contends that this lab analysis fee was greater than the statutory specification, and also that section 11372.5 describes a predominantly administrative fee, which he claims should not support the inclusion of penalty assessments. (*People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*).)

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<sup>3</sup> Section 11372.7, subdivision (a) provides: "(a) Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law."

<sup>4</sup> Section 11372.5, subdivision (a) provides in pertinent part: "Every person who is convicted of a violation of [numerous drug laws, including, as relevant here, §§ 11378, 11379, etc.] shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law."

As will be explained, we reject Ford's claims that penalty assessments do not apply to the lab analysis fee and the drug program fee, or they were inadequately recorded in the abstract of judgment. (Pts. II, III, *post*.) However, since only one such status enhancement under section 11370.2, subdivision (c) was allowable for the prior drug conviction (pt. I, *post*), we affirm the judgment as modified to strike the redundant enhancement, with directions to prepare an amended abstract of judgment.

## I

### *SECTION 11370.2, SUBDIVISION (C) ENHANCEMENT*

After the jury rendered its verdict of conviction, the court took Ford's admission that he had a prior drug conviction within the meaning of section 11370.2, subdivision (c). Where, as here, a defendant is convicted of and sentenced on a current drug-related crime, section 11370.2, subdivision (c) specifies that the court must impose an additional "full, separate, and consecutive three-year term" for each such prior felony conviction, "whether or not the prior conviction resulted in a term of imprisonment." (*Ibid.*)

It is settled that this type of status enhancement under section 11370.2, based on a prior conviction, is applied only once in arriving at the aggregate sentence. (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057-1058; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 542.) We therefore agree with the concessions by the Attorney General's office that it was error for the trial court to attach the section 11370.2, subdivision (c) enhancement to both counts, and one should be stricken. We shall affirm the judgment as so modified and direct the trial court to prepare an amended abstract of judgment that reflects the imposition of this enhancement on only one count.

## II

### *ALLOWABLE AMOUNTS FOR LAB ANALYSIS FEE AND DRUG PROGRAM FEE*

Based on the probation officer's recommendation, the trial court imposed a lab analysis fee of \$205, composed of the \$50 statutory amount plus \$155 in penalty assessments. Additionally, the court ordered a drug program fee of \$615, representing the \$150 statutory amount plus \$465 in penalties. Ford acknowledges that he did not make any objection at the trial level, either to the amounts of these fees, or to any showing about his ability to pay the drug program fee. (§ 11372.7, subd. (b).) He nevertheless claims entitlement to challenge the sentence components that were not statutorily authorized, as representing jurisdictional error that is correctable on appeal. (*Martinez, supra*, 65 Cal.App.4th 1511, 1519; *Watts, supra*, 2 Cal.App.5th 223, 227, fn. 4; *People v. Smith* (2001) 24 Cal.4th 849, 852.)

Such statutory interpretation issues are questions of law that may be addressed here, regardless of any waiver or forfeiture contentions by the Attorney General's office. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153, 1157 (*Talibdeen*) [newly raised claim is cognizable on appeal if it addresses legal error at sentencing that is correctable without reference to or need for factual findings]; *People v. Wallace* (2004) 120 Cal.App.4th 867, 874 (*Wallace*) [punitive nature of assessment is determined by reference to evident purpose of statutory scheme].)

Initially, Ford challenges both the lab analysis fee and the drug program fee as exceeding the statutorily specified amounts, \$50 and \$150, respectively. Based on his reading of the relevant statutes, he claims these fines should be reduced and the judgment

corrected accordingly. It is true that section 11372.5, subdivision (a) mandates that "[e]very person who is convicted of a violation of [ §§ 11378 or 11379, among others] shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense." The statute next requires that the court increase the total "fine" necessary to include this increment. (*Ibid.*) Likewise, section 11372.7 provides that a person convicted of this type of current offense (e.g., § 11379, subd. (a)), shall pay a drug program fee not to exceed \$150 for each separate offense. Section 11372.7 then requires the court to increase the total "fine," if necessary, to include this increment. (*Ibid.*)

Ford's arguments, however, disregard other important portions of the statutory scheme of which section 11372.5 (lab analysis fee) and section 11372.7 (drug program fee) are only a part. It is shortsighted to claim that merely "fees" were imposed, when Penal Code section 1464 and Government Code section 76000 additionally mandate penalties or assessments upon every "fine, penalty, or forfeiture" imposed by a trial court in a criminal case.<sup>5</sup>

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<sup>5</sup> Penal Code section 1464, subdivision (a)(1) provides in pertinent part: "Subject to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and except as otherwise provided in this section, there shall be levied a state penalty in the amount of ten dollars (\$10) for every ten dollars (\$10), or part of ten dollars (\$10), *upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . .*" (Italics added; "forfeiture" in this context refers to forfeiture of bail, which is not an issue here.) Similarly, Government Code section 76000, subdivision (a)(1) imposes a penalty payable to the county, as follows: " . . . [I] n each county there shall be levied an additional penalty in the amount of seven dollars (\$7) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . ."

In *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1696 (*Sierra*), the court stated that a drug program fee imposed under section 11372.7 amounts to a "fine and/or a penalty to which the penalty assessment provisions of Penal Code section 1464 and Government Code section 76000 apply." The court reached this conclusion because section 11372.7 "defines the drug program fee as an increase to the 'total fine' and later as a fine in addition to 'any other penalty.' " (*Sierra, supra*, at p. 1695; italics omitted.) The court stated this was "[t]he only reasonable interpretation of [section 11372.7] . . . ." (*Sierra, supra*, at p. 1696.)

Initially, in *Martinez, supra*, 65 Cal.App.4th 1511, the appellate court noted that it was error for the trial court in that case to set the lab analysis fee at \$100, when the defendant had only one current conviction, and the statute only authorized such a fee at \$50. (*Id.* at p. 1519.) The appellate court accordingly modified the judgment to reduce the lab analysis fee to the statutory limit for the current conviction, but it did this before considering the penalty assessment issues. (*Ibid.*) Ford fails to acknowledge that the court in *Martinez, supra*, at page 1522, went on to discuss and approve the addition of penalty assessments to the lab analysis fee. It agreed with the reasoning of *Sierra, supra*, 37 Cal.App.4th 1690, 1694-1695, to conclude that a section 11372.5 lab analysis fee is also a fine that is subject to mandatory penalty assessments. Section 11372.5 provides that the lab analysis fee is an increase to the total fine, and it therefore "is subject to penalty assessments." (*Martinez, supra*, at p. 1522; see also *People v. Sharret* (2011) 191 Cal.App.4th 859, 869 (*Sharret*) ["the Legislature intended the section 11372.5 criminal laboratory analysis fee to be punitive"].)

In *Talibdeen, supra*, 27 Cal.4th 1151, 1153-1155, the California Supreme Court did not directly address whether a lab analysis fee was actually a fine, but instead focused on the related issue of whether a trial court had the discretion to waive penalties under Penal Code section 1464. The court in *Talibdeen* held such penalties are mandatory. (*Talibdeen, supra*, at p. 1157.) In reaching that conclusion, the Supreme Court stated, "Although subdivision (a) of Penal Code section 1464 and subdivision (a) of Government Code section 76000 *called for* the imposition of state and county penalties based on such a fee, the trial court did not levy these penalties . . . ." (*Talibdeen, supra*, at p. 1153; italics added.)

Ford argues *Talibdeen* is not controlling because that case did not decide his issue directly and the Supreme Court only assumed without deciding that penalty assessments attach to the lab analysis fee under section 11372.5. The *Talibdeen* court's language and intention seems clear: Penal Code section 1464 and Government Code section 76000 "called for"—that is, required—assessment of penalties on the lab analysis fee imposed under section 11372.5. (*Talibdeen, supra*, 27 Cal.4th at p. 1153.) We should be guided by Supreme Court authority even if it is arguably dicta. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) The same reasoning should apply to section 11372.7.

Accordingly, we cannot accept Ford's argument that the statutory references to the lab analysis fee of \$50 in section 11372.5, and/or the drug program fee of \$150 in section 11372.7, can be read in isolation as constituting a cap on the allowable fines and penalties in those respects. Instead, it was appropriate for the trial court to specify that penalty



assessments must be added to these particular types of fees, as additional increments of the overall fine. As a matter of statutory construction, and in line with other authorities that have considered the issues, we cannot say that it was incorrect or unauthorized for the trial court to impose a lab analysis fee in the aggregate amount of \$205. The drug program fee of \$615 permissibly included additional increments under the applicable statutory scheme for penalty assessments.

Further, to the extent that Ford's reply brief seeks remand of the case to require the trial court to make a more detailed specification of the various components of the penalty assessments imposed, he cannot show justification for this request. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26 [court need not consider new arguments in reply brief without a showing of good reason for a failure to present them earlier].) Even considering the point, the record shows that during the sentencing hearing, the court discussed the fines components with the probation officer and then specified that the drug program fee under section 11372.7 would be imposed in the amount of \$615, including the penalty assessment. Likewise, a lab analysis fee pursuant to section 11372.5 was imposed in the amount of \$205, which was said to include the penalty assessment. The abstract of judgment duly specifies the statutory authority for each of the subject fees, and sets the same aggregate amounts, identifying them as fines. (See *Martinez, supra*, 65 Cal.App.4th 1511, 1523 [abstract of judgment must set forth and reflect the imposition of fines such as section 11372.5 lab analysis fees]; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1331.)

As did the court in *Sharret, supra*, 191 Cal.App.4th 859, 863-864, the Attorney General's respondent's brief enumerates the various penalty assessments that were imposed under sections 11372.5 and 11372.7, as permitted and required by Penal Code section 1464, Government Code section 76000, and like statutory provisions. Ford agrees that those amounts "would be correct if the penalty assessments were to apply." As further noted in *Sharret, supra*, 191 Cal.App.4th at page 864, it is an acceptable practice for a trial court to orally impose penalties and surcharges "by a shorthand reference to 'penalty assessments.' The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment." (*Ibid.*) These basic standards were met here and the penalty amounts imposed were authorized by statute. The interests of justice do not require that any further clerical corrections be implemented.

### III

#### *NATURE OF LAB ANALYSIS FEE; PENALTY ASSESSMENTS*

Ford separately argues it was error for the trial court to attach penalty assessments to the lab analysis fee, which he claims is not punitive in nature, but rather administrative. He reasons that his basic \$50 fee did not qualify as a "fine" or "penalty," to which penalty assessments can be added. (*People v. Vega* (2005) 130 Cal.App.4th 183, 194-195 ["[f]ines are imposed for retribution and deterrence; fees are imposed to defray administrative costs."].)

The definitions in Penal Code section 1463, subdivision (1) of "[t]otal fine [or forfeiture]" begin with the statement that it "means the total sum to be collected upon a

conviction," and it may include, but is not limited to, numerous specified components, according to the particular offense: "(1) The 'base fine' upon which the state penalty and additional county penalty is calculated," plus other enumerated state and county penalties. (Pen. Code, § 1463, subd. (1)(1)-(7) [e.g., Pen. Code, § 1464 and Gov. Code, § 76000].)

In the context of Ford's offenses, section 11372.5 provided for the imposition of a lab analysis fee of \$50. Under subdivision (b) of that statute, the courts shall transmit the monies recovered, in addition to fines and forfeitures, to the county treasurer, and the county may "retain an amount of this money equal to its administrative cost incurred pursuant to this section." (§ 11372.5, subd. (b).) Proceeds must be used to pay costs incurred by crime laboratories in providing analyses for controlled substances in connection with criminal investigations, in purchasing and maintaining laboratory equipment, and in funding the continuing education and training of their forensic scientists.

Ford's arguments rely on language in *Watts*, *supra*, 2 Cal.App.5th 223, 234, in which the court said that the references in section 11372.5, subdivision (a) "to the phrases 'total fine,' 'fine,' and 'any other penalty' " do not "establish that the crime-lab fee constitutes a 'fine' or 'penalty' within the meaning of the statutes governing penalty assessments. As to the statute's reference to 'total fine,' we fail to perceive how the fact that the crime-lab fee increases the 'total fine' necessarily means the fee is itself a 'fine' subject to penalty assessments. Nothing about the statute's use of the phrase 'total fine' is inconsistent with the conclusion that the crime-lab fee simply gets added to the overall charge imposed on the defendant after penalty assessments are calculated." (*Watts*,

*supra*, at p. 234.) The court in *Watts* thus concluded, "the Legislature intended the crime-lab fee to be exactly what it called it in the first paragraph [of § 11372.5], a fee, and not a fine, penalty, or forfeiture subject to penalty assessments." (*Watts, supra*, at p. 231.)

Ford likewise contends the court erred in imposing penalty assessments on the lab analysis fee imposed in his case, and argues, "the issue can be condensed down to and what the court needs to focus on is whether or not the Legislature intended the lab analysis fee to serve as a punitive measure or an administrative function." He requests a ruling that "because the laboratory analysis fee performs an administrative function, rather than a punitive one, the penalty assessments do not apply." (*People v. Moore* (2015) 236 Cal.App.4th Supp. 10, 17 [lab analysis fee is not a fine].)

In response, the Attorney General raises numerous arguments and comparisons to other types of sentencing fees and fines, to conclude section 11372.5 is primarily punitive in nature and not merely an administrative measure. For example, a DNA fee prescribed by Government Code section 76104.6 is deemed punitive, because it is "explicitly designated a penalty; it is calculated in direct proportion to other fines, penalties, and forfeitures imposed; it is collected using the same provision for collecting the state penalty assessment; and it will be used primarily for future law enforcement purposes." (*People v. Batman* (2008) 159 Cal.App.4th 587, 591.) This kind of punitive fee is to be distinguished from a court security fee under Penal Code section 1465.8, subdivision (a)(1), which is a budget measure and nonpunitive. (*Wallace, supra*, 120 Cal.App.4th 867, 875-878; *Sharret, supra*, 191 Cal.App.4th at pp. 869-870.) Likewise, a Government Code section 29550.2 criminal justice administration fee is deemed nonpunitive, because

it is tied to actual administrative costs of processing a prosecution. (See *People v. Rivera* (1998) 65 Cal.App.4th 705, 711.) But here, section 11372.5 was not obviously designed as a user fee for recouping administrative costs. Even assuming the Legislature had multiple purposes in creating the lab analysis fee, the language of section 11372.5 does not show any legislative intent to exempt money assessed under it from other mandatory penalties. (*Sharret, supra*, at pp. 869-870.)

In the related context of applying a stay of punishment under section 654, the court in *Sharret, supra*, 191 Cal.App.4th 859, 869-870 decided the lab analysis fee is punitive in nature, not administrative, for numerous reasons. Section 11372.5 identifies the lab analysis fee as an increment increasing the total fine. (*Sharret, supra*, at pp. 869-870; Pen. Code, § 1463, subd. (l).) Relying in part on *Talibdeen, supra*, 27 Cal.4th at page 1153, the court said, "Although described as a 'fee,' the criminal laboratory analysis fee is an increment of a fine and as such it is a fine. [Citations.] And, as our Supreme Court has held, 'Fines arising from [criminal] convictions are generally considered punishment.' [Citations, including *People v. Alford* (2007) 42 Cal.4th 749, 757; *Wallace, supra*, 120 Cal.App.4th at p. 875.]" (*Sharret, supra*, at p. 869.) A lab analysis fee is therefore subject to additional penalty assessments on fines. (*Ibid.*)

In *Sharret, supra*, 191 Cal.App.4th 859, the court went on at some length, outlining these additional reasons why the laboratory analysis fee must be deemed to be punitive in nature. "[A] [lab] analysis fee is imposed only upon conviction of a criminal offense involving the manufacture, cultivation, possession, use, transportation or sale of a controlled substance. It has no application in a civil context. Third, the fee is assessed in

proportion to a defendant's culpability insofar as it applies to each separate conviction of a violation of specified sections of the Health and Safety Code governing controlled substances. Fourth, the [lab] analysis fee is mandatory and there is no ability to pay requirement. Fifth, the funds imposed and collected are to be used for law enforcement purposes. The [lab] analysis fee is earmarked for the criminalistics laboratories fund, which has no civil purpose. That fund enables local governments to cover the costs of analyses by criminalistics laboratories in connection with criminal investigations, to purchase and maintain equipment necessary to that task, and to educate and train forensic scientists employed by such labs. Sixth, section 11372.5 contains no language suggesting the Legislature intended to exempt the [lab] analysis fee from section 654. [Citations.] Seventh, there is no evidence section 11372.5 was a mere budget measure as in the case of the Penal Code section 1465.8, subdivision (a) court security fee. [Citations.] Eighth, when the mandatory penalties and surcharge are added, the total amount due is \$180 which is substantially greater than the \$20 Penal Code section 1465.8, subdivision (a) court security fee in *Alford* [, *supra*, 42 Cal.4th 749; now a \$40 fee]. Therefore, as it is punitive in nature, the [lab] analysis fee imposed as to count 1 must be stayed under section 654 along with the charge of which defendant was convicted." (*Sharret, supra*, at p. 870.)

Based on all of the above factors and reasoning, we conclude section 11372.5 is punitive in nature and thus supports adding to the lab analysis fee, an increment of a fine, the statutorily authorized penalty assessments. (*Sharret, supra*, 191 Cal.App.4th 859, 869-870.)

## DISPOSITION

The judgment is affirmed as modified to strike one of the section 11370.2 status enhancements. The superior court is directed to prepare an amended abstract of judgment accordingly.

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HUFFMAN, Acting P. J.

WE CONCUR:

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NARES, J.

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AARON, J.